

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Amendment of Section 73.202(b))
Table of Allotments) MB Docket No. 04-411
FM Broadcast Stations) RM - 11096
(Georgetown, Mason, Oxford and)
West Union, Ohio, and Salt Lick, Kentucky))

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To: Office of the Secretary
Attn: Assistant Chief, Audio Division
Media Bureau

Federal Communications Commission
Office of Secretary

MOTION TO DISMISS REPLY COMMENTS

First Broadcasting Capital Partners, LLC ("First Broadcasting"), licensee of Stations WOXY(FM), Oxford, Ohio, and WAXZ(FM), Georgetown, Ohio, and Dreamcatcher Communications, Inc. ("Dreamcatcher"), licensee of Station WRAC(FM), West Union, Ohio (collectively, the "Petitioners"), by their respective counsel, hereby submit their Motion to Dismiss directed to the Reply Comments filed by Gateway Radio Works, Inc. ("Gateway") on January 11, 2005. Gateway's Reply Comments should be dismissed because they are not legitimate reply comments, but instead serve to provide supplemental information that should have been submitted by Gateway in its Counterproposal. See 47 C.F.R. §§ 1.415(c), 1.420(b). In support hereof, Petitioners state as follows:

1. Gateway's first filing in this proceeding was its Counterproposal filed on December 27, 2004, the last day of the comment period. This Counterproposal was filed in response to Petitioner's Petition for Rule Making. See NPRM, DA 04-3513 (rel. Nov. 5, 2004). In its Counterproposal, Gateway, *inter alia*, claims that Dreamcatcher's proposal to move WRAC(FM) to Georgetown will leave West Union without local service because Station

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WVXW(FM), the remaining service at West Union, is a “satellite” station. *See* Counterproposal at ¶ 6. This claim is without merit, and Gateway’s Counterproposal has cited no rule, policy, or case to support its conclusion. Now, in its Reply Comments Gateway seeks to bolster its showing, which it must have believed to be inadequate or else it would not need to provide the additional information. However, Gateway is not “replying” to any issues raised by Petitioners or any other party in this proceeding, as is the limited purpose of Reply Comments. *See* 47 C.F.R. §§ 1.415(c), 1.420(b). Therefore, Gateway’s Reply Comments must be dismissed.

2. In addition to this procedural defect, Petitioners assert that the substance of Gateway’s Reply Comments are irrelevant to this proceeding. Gateway is alleging that Station WVXW(FM) is not adequately serving the community of West Union, Ohio as it is required to do. However, this is not the appropriate forum to consider Station WVXW(FM)’s performance. As Petitioners stated in their Reply Comments, it is established Commission policy that “satellite” stations are required to meet all local service obligations, including local programming obligations.¹ Furthermore, the Commission cannot adequately assess Station WVXW(FM)’s performance in this proceeding because it is only hearing one side of the issue. Xavier University, licensee of Station WVXW(FM) has not been served and has not had the opportunity to respond to the allegations raised by Gateway. But, there is no need to seek the licensee’s response because regardless of what programming is offered by the station, the obligation remains for WVXW(FM) to serve its community of license. Thus, because Station WVXW(FM) will remain licensed to West Union, Petitioners’ proposal to change the

¹ *Review of Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd 15691 (1998), *recon. granted in part*, 14 FCC Rcd 11113 (1999); *see Delmarva Educational Association For a New FM Broadcast Station at Cheriton*, 19 FCC Rcd 6793, ¶ 11 (2004); *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau to Jeffrey D. Southmayd, Esq., counsel to the Moody Bible Institute of Chicago* (December 10, 2002).

community of license of Station WRAC(FM) from West Union to Georgetown complies with the Commission's rules.²

3. Gateway's Reply Comments are procedurally defective and substantively irrelevant. Therefore, Petitioners respectfully request that the Commission dismiss Gateway's Reply Comments and grant Petitioners' proposal as stated in the *NPRM*.

Respectfully submitted,

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January 24, 2005

² See *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recons. granted in part*, 5 FCC Rcd 7094 (1990); see also *Crisfield, Maryland, et al.*, 18 FCC Rcd 19561, ¶ 19 (2003). Gateway cites *Crisfield* for the proposition that whether a noncommercial educational station is meeting its local service obligations is a "rebuttable presumption." See Reply Comments at ¶ 6. This is a mischaracterization of the Commission's holding. In *Crisfield*, the Commission expressly stated that the noncommercial educational station at issue "will be obligated to serve the community's needs and interests." 18 FCC Rcd at ¶ 19. The Commission's later discussion of the station's programming was dicta.

CERTIFICATE OF SERVICE

I, Lisa M. Holland, a secretary in the law firm of Vinson & Elkins, do hereby certify that on this 24th day of January, 2005, I caused copies of the foregoing "**Motion to Dismiss**" to be mailed, first class postage prepaid, or hand delivered, addressed to the following persons:

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